SUPREME COURT, U. S.

APR 29 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1373

PROBRO, INC., dba Lakewood Club,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

ELLIS J. HORVITZ,
SAMUEL GOLDFARB and
BERNARD A. MINKOW,
15720 Ventura Boulevard,
Encino, Calif. 91316,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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No. .....

PROBRO, INC., dba Lakewood Club,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Probro, Inc., a corporation, respectfully prays that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of California entered in the above matter on January 31, 1968.

Opinion Below.

The Decision of the California Court of Appeal, Second District, Division I, is printed as Appendix D hereto.

Jurisdiction.

The order of the California Supreme Court denying petition for Hearing was entered on January 31, 1968. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

Statement of Questions Presented.

Is the California Constitution, Article XX, Section 22 and California Business and Professions Code, Section 24200(a) unconstitutional and violative of the due process clause of the Fourteenth Amendment of the United States Constitution because they are vague and uncertain in that (a) they do not give the liquor licensee any notice of the kind of conduct that is or is not contrary to public welfare and morals; and (b) the standard under the Constitution and the statute is ever varying and changing with fluctuations of moral sentiments?

Is the Department of Alcoholic Beverage Control of the State of California, an administrative agency, violating the due process clause of the Fourteenth Amendment to the United States Constitution when it acts to suspend the liquor license of a licensee when it has promulgated no standards, rules or regulations to apprise and give notice to the liquor licensee that the conduct for which the licensee has been accused is conduct violative of state law, but rather the Department has relied solely for its action upon the standard that the conduct is "contrary to public welfare and morals"?

Is the Department of Alcoholic Beverage Control of the State of California violating the due process clause of the Fourteenth Amendment to the United States Constitution when it acts to suspend the liquor license of a licensee by determining for itself that the conduct

is subject to disciplinary action in that such conduct is contrary to public welfare and morals without any evidentiary showing to the trier of fact, how, why, or in what manner, the conduct complained of is contrary to public welfare and morals?

Is the Department of Alcoholic Beverage Control of the State of California denying Petitioner equal protection under the law in suspending the liquor license of a licensee for conduct alleged to be subject to disciplinary action by the Department when that same conduct has been held in cases in the state courts of California[1] to be non-violative of state law?

Has the Department of Alcoholic Beverage Control of the State of California acted as a censor in that it has assumed that it has knowledge and expertise to determine whether or not the conduct complained of is to be prohibited?

Statutory Provisions Involved.

Article XX, Section 22, California Constitution,

> "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the

[1] *Boreta Enterprises, Inc. dba Off Broadway v. the Department of Alcoholic Beverage Control of the State of California,* San Francisco Superior Court Case No. 570 652 (1967); *Probro, Inc. v. Department of Alcoholic Beverage Control of the State of California,* Los Angeles Superior Court Case No. 920 751 (1968).

power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State."

Section 24200, Business and Professions Code,

"Grounds. The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution."

Statement of the Case.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of California. Petitioner applied for an on-sale beer license for the subject premises from the Department of Alcoholic Beverage Control and was granted a license on March 11, 1966. On May 6, 1966, the Department of Alcoholic Beverage Control issued an accusation against Petitioner alleging that Petitioner's employment of "topless" waitresses was conduct contrary to public

welfare and morals and thus violative of Article XX, Section 22 of the California Constitution and Section 24200(a) of the California Business and Professions Code. Upon a hearing before a Hearing Officer the Officer issued a decision in favor of Petitioner, stating that no cause of action existed against Petitioner and thus dismissed the accusation. The Department, under its authority granted by California Government Code Section 11517 refused to accept the Hearing Officer's decision and issued a decision finding that Petitioner's employment of "topless" waitresses was contrary to public welfare and morals and ordered that the license be suspended for 45 days with 15 days stayed under certain conditions. The Department's decision was then appealed to the Alcoholic Beverage Control Appeals Board. The Appeals Board issued a decision upholding the Department. A petition for writ of mandate was then filed in the Los Angeles Superior Court on November 2, 1967, Los Angeles Superior Court Case No. 920 751.

On November 30, 1966, prior to a decision by the Alcoholic Beverage Control Appeals Board on the accusation against Petitioner, the Department of Alcoholic Beverage Control issued another accusation against Petitioner, again alleging that the employment of "topless" waitresses was conduct contrary to public welfare and morals and violative of the California Constitution and California Business and Professions Code. A hearing was held before a Hearing Officer. This

Hearing Officer issued a decision upholding the accusation and ordering Petitioner's license to be suspended for 30 days. The Department of Alcoholic Beverage Control adopted the Hearing Officer's decision. An appeal of the Department's decision was taken to the Alcoholic Beverage Control Appeals Board and the Appeals Board upheld the Department's decision.

On November 8, 1967, amendments to the California Business and Professions Code went into effect which provided that judicial review of the decisions of the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board would be heard before the California Courts of Appeal or the California Supreme Court, whereas prior to that time, judicial review of such decisions were heard before the Superior Courts of the State. By reason of the statutory amendments, the petition for writ of mandate in the second topless accusation was filed with the California Court of Appeal, Second District. Said petition was filed on December 1, 1967. Therefore, due to the aforementioned statutory amendment, the latter accusation, which is referred to herein as the "second accusation" was placed procedurally ahead of the earlier accusation. It is the second accusation that is the subject for this Petition for Writ of Certiorari.

The petition for writ of mandate before the Court of Appeal was denied on January 2, 1968. A petition for hearing before the California Supreme Court was denied on January 31, 1968.

On February 5, 1968, a hearing on the petition for writ of mandate in the first accusation was held in the Los Angeles Superior Court. The judge found that the Department's finding that the employment of "topless" waitresses is contrary to public welfare and morals was not supported by substantial evidence. The judge thus issued a decision setting aside the Department's decision and remanded the proceeding to the Department for further hearing on the issue of whether or not the employment of topless waitresses is contrary to public welfare and morals.

In both accusations, Petitioner's attorney stipulated with the attorney for the Department of Alcoholic Beverage Control that the facts alleged in the accusations were true, *i.e.*, that Petitioner did, on the dates specified, employ "topless" waitresses. No other evidence was introduced by either party at either hearing. The Department's decisions in the absence of any evidence showing how the conduct was contrary to public welfare and morals held said conduct to be contrary to public welfare and morals as a matter of law. The Los Angeles Superior Court judge held that such a holding was erroneous.

There is a case now before the California Court of Appeal, First District, involving the same issue, *Boreta Enterprises, Inc. dba Off Broadway v. the Department of Alcoholic Beverage Control of the State of California.* In this case, the San Francisco Superior Court judge granted a petition for writ of mandate from a

liquor licensee and set aside the decision of the Department of Alcoholic Beverage Control. The judge held that the employment of "topless" waitresses was not contrary to public welfare and morals and was not grounds for the suspension or revocation of a license.

After receiving the decision of the Los Angeles Superior Court, Petitioner filed a petition for stay order with the California Court of Appeal, Second District, asking that the administrative order of the Department of Alcoholic Beverage Control be stayed until either a decision on the first accusation became final or until the United States Supreme Court had acted upon Petitioner's Writ of Certiorari, whichever occurred later. The Court of Appeal denied the petition on February 27, 1968.

Petitioner duly raised the federal questions presented here at the original hearing [R. T. pp. 1, 2 and 3], before the Alcoholic Beverage Control Appeals Board, and in the California Court of Appeal, and in the California Supreme Court by its pleadings.

On February 28, 1968, petitioner filed an application for stay of administrative decision of the Department of Alcoholic Beverage Control of the State of California with this Court. On March 5, 1968, Associate Justice William O. Douglas of this court issued an order staying the administrative order of the Department of Alcoholic Beverage Control of the State of California pending the timely filing of a petition for Writ of Certiorari and this Court's action on the said petition.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The Department of Alcoholic Beverage Control of the State of California Has Acted Arbitrarily to Deprive Petitioner of His Right to Operate a Liquor Establishment for Which It Has Been Licensed Without Due Process of Law.

The Department of Alcoholic Beverage Control of the State of California, an administrative agency of the State, has ordered a suspension of Petitioner's on-sale beer license for a period of 30 days without establishing that Petitioner has violated any rule or regulation of the Department or statute of the State of California. In fact, the Department of Alcoholic Beverage Control had not promulgated or established any rules, regulations or standards, nor had the State of California any statute which apprised the Petitioner that the employment of topless waitresses is a violation subject to disciplinary action. Therefore, Petitioner had no set of standards, rules or regulations to apprise it whether or not the employment by it of topless waitresses was in violation of any rule or regulations of the Department of Alcoholic Beverage Control or statute of the State of California.

It must be assumed that the Department of Alcoholic Beverage Control has taken it upon itself to set up a standard *without giving notice of such standard to licensees* that the employment of "topless" waitresses in and of itself is action contrary to public welfare and morals and thus is grounds for suspension or revocation of a license. The standard is arbitrary and unreasonable and is an abuse of the Department's discre-

tionary powers. The Department of Alcoholic Beverage Control clearly does not have the expertise to make this determination; it is a determination that must be made by the courts or by the legislature. There has been no legislative action nor definitive court decision on the issue at the present time. The Department thus has gone beyond the limits of its authority and has abused its discretion in declaring the employment of "topless" waitresses to be contrary to public welfare and morals. By so acting in suspending Petitioner's license, the Department has deprived Petitioner of a valuable property right without due process of law.

Besides the fact that there were no rules, regulations or standards to apprise Petitioner that such conduct would be considered violative of the Statutes of the State of California by the Department of Alcoholic Beverage Control, the Department of Alcoholic Beverage Control produced no evidence whatsoever to show how or in what manner the employment of "topless" waitresses is violative of any statute or regulation, *i.e.*, conduct contrary to public welfare and morals. In the absence of some evidence, the Department of Alcoholic Beverage Control of the State of California cannot suspend Petitioner's license, and to do so is denying Petitioner its right of due process of law.

The Department of Alcoholic Beverage Control has relied upon California Constitution Article XX, Section 22, and California Business and Professions Code, Section 24200 (a) which gives the Department authority to suspend or revoke a license for conduct "contrary to public welfare and morals." Such provisions are vague and uncertain in that the licensee is given no notice of what conduct would be considered to be violative of the

state law; the standard set up by the statute and constitutional section in question is, at best, an ever-varying-changing standard, fluctuating with the changes of moral sentiment.

This Court has on innumerable occasions held a state statute void as violating the due process clause of the Fourteenth Amendment in that the language of the statute was so vague and standardless that it left the public uncertain as to the conduct it prohibited.

See:

Giaccio v. Pennsylvania, 382 U.S. 399;
Baggett v. Bullitt, 377 U.S. 360;
American Communication Association v. Douds, 339 U.S. 382.

This Court has found that photographic nudes as well as nude paintings come within the broad guarantees of the First Amendment.

See:

Sunshine Book Co. v. Summerfield, 355 U.S. 372;
Mounce v. U.S., 355 U.S. 180;
Manual Enterprises, Inc. v. Day, 370 U.S. 478.

This court has also found that "girlie pictures" in coin operated peepshows are not obscene and thus protected under the First Amendment.

See:

Schackman v. California, 87 S. Ct. 2107;
Katner v. California, 87 S. Ct. 2090;
Colbert v. New York, 87 S. Ct. 2092.

This court has also insisted upon strict standards relative to vagueness in the area of free expression and the statutes involved in this case are too vague to be permissible.

See:

Smith v. California, 361 U.S. 147;
Winters v. New York, 333 U.S. 507;
Herndon v. Lowery, 301 U.S. 242;
Cantwell v. Connecticut, 310 U.S. 296.

II.

The Department of Alcoholic Beverage Control of the State of California Is Denying Petitioner Equal Protection Under the Laws by Proceeding With This Suspension When Other Cases in the State of California Have Found the Employment of "Topless" Waitresses Not to Be Contrary to Public Welfare and Morals.

The Department of Alcoholic Beverage Control is acting to suspend the Petitioner's on-sale beer license for 30 days with full knowledge that there has been no definitive final decision by the California Supreme Court on whether or not the employment of "topless" waitresses is action sanctionable by the Department. There have been two court decisions known to Petitioner in the State of California (there may be other court cases decided in favor of licensees) on exactly the same issue as this case that hold that such conduct is not sanctionable, thus permitting licensees to remain open. *Boreta Enterprises, Inc. dba Off Broadway v. the Department of Alcoholic Beverage Control of the State of California,* San Francisco Superior Court Case No. 570 652 (1967); *Probro, Inc. v. Department of Alcoholic Beverage Control of the State of Cali-*

fornia, Los Angeles Superior Court Case No. 920 751 (1968). In fact, one of these cases involves Petitioner itself. Thus there is a disparity of decision throughout the State of California on the this issue. Some court decisions have allowed licensees employing "topless" waitresses to remain open and the other decisions have ordered a license suspended for the employment of "topless" waitresses. Thus at the present time in the State of California, there exists an unequal application of the law by the Department of Alcoholic Beverage Control, a statewide agency, in that some establishments are allowed to remain open while others are closed although all of these establishments were permitting the same conduct. Until there has been a final decision by the highest court in the state, the Department of Alcoholic Beverage Control, by suspending Petitioner's license, is denying Petitioner equal protection under the law.

III.

The Department of Alcoholic Beverage Control of the State of California Has Acted as a Censor in That Itself Alone Has Determined the Employment of "Topless" Waitresses Is Wrong and Is Grounds for Penalty.

The Department of Alcoholic Beverage Control is alone determining whether the actions of Petitioner are to be sanctioned without any standards or rules or regulations set forth by which to independently judge whether the conduct of Petitioner is in fact violative of any statutes. The Department of Alcoholic Beverage Control is clearly prescribing semi-nudity as wrong in and of itself. While the Department's power is to regulate the sale of alcoholic beverages, neither the Twenty-First Amendment to the United States Con-

stitution nor the constitutional laws of the State of California empower the Department to act as a censor or to constitute it to be a critic of art; nor is there basis for the Department expanding its authority to regulate the attire of waitresses without any showing of a "wrong" or "evil" to be cured.

What the Department of Alcoholic Beverage Control has done amounts to prior restraint. It alone has seen fit to determine that the employment of "topless" waitresses is wrong and is grounds for suspension or revocation of a liquor license.

This court has declared prior restraints to be unconstitutional.

See:

Freedman v. Maryland, 380 U.S. 51;

Superior Films, Inc. v. Department of Education, 346 U.S. 587.

Conclusion.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ELLIS J. HORVITZ,
SAMUEL GOLDFARB and
BERNARD A. MINKOW,
Counsel for Petitioner.

APPENDIX A.

Proposed Decision.

State of California, Department of Alcoholic Beverage Control.

In the Matter of the Accusation against Probro, Inc. Lakewood Club, 17436-38 So. Lakewood Blvd., Bellflower. Respondent and Licensee under the Alcoholic Beverage Control Act.

File 38416

Reg. 2586

Licenses: 40-38416

Time of Hearing: 2-21-67 9:00 a.m.

Place of Hearing: 314 W. First St., L. A.

Reporter: Louise Lillico OLA 14325

Appearances: For Dept: Richard K. Quan, Deputy Attorney General. For Resp: Samuel Goldfarb, Esq. 15720 Ventura Boulevard, Encino, California.

FINDINGS OF FACT:

COUNT I

The demurrer to the Accusation was overruled on each of the points raised and it was then stipulated that the facts alleged are true and I accordingly find it to be true that within one year last past and immediately preceding the date of this accusation, respondent licensee, directly and by and through its agents, employees, and servants, permitted and suffered the above-designated licensed premises to be used in a manner more particularly described below, which did create a condition then and there contrary to public welfare and morals in violation of Article XX, Section 22 of the

California State Constitution and Section 24200(a) of the Business and Professions Code:

1. On or about May 27, 1966, respondent licensees, at and in the above-designated licensed premises, did employ and use the services of a female, Reagan Wilson, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini shorts with her breasts fully exposed.

2. On or about May 28, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Joan Rae Allen, and did permit and suffer the said female to tend bar and wait on patrons while attired in panty shorts with her breasts fully exposed.

3. On or about June 21, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Judithann Hudson aka Reidman, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini pants with her breasts fully exposed.

4. On or about July 29, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Sharon Lee Huff, and did permit and suffer the said female to tend bar and wait on patrons while attired in capri pants with her breasts fully exposed.

5. On or about October 26, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of two females, Joanne Mary Turcotte and Margaret Theodosia Dosa, and did permit and suffer the said females to tend bar and wait on patrons while attired in bikini pants with their breasts fully exposed.

6. For purposes of considering the imposition of penalty against the respondent, if any, it is further found that the above named respondent has permitted certain female employees to tend bar and wait on patrons while attired in brief bikini-type panties with their breasts fully exposed at the above described premises, commencing on or about March 21, 1966 and continuing thereafter up to the date of this accusation, including, but not limited to, the dates hereinabove mentioned in paragraphs 1, 2, 3, 4 and 5. Said conduct continued notwithstanding the filing of an accusation against said respondent on or about May 6, 1966 entitled "In the Matter of the Accusation Against Probro, Inc. dba Lakewood Club," File No. 38416, Reg. No. 9344, alleging a violation of Article XX, Section 22 of the California Constitution and Section 24200(a) of the Business and Professions Code for permitting said conduct to occur on said licensed premises on four specified dates, to wit, on March 21, 1966, March 22, 1966, March 25, 1966 and April 23, 1966.

* * * * *

Despite the allegation in sub-count 6 of Count I for the purpose only of considering any penalty to be imposed and the stipulation that the facts therein set forth are true, said facts are not being considered in the penalty recommended below because the decision on the prior accusation referred to is still not final.

FINDINGS AS TO PREVIOUS RECORD:

Licensed since December 16, 1965. Under Reg. 9344 and following a decision under Government Code Section 11517(c), the license was suspended for 45 days with 15 days stayed operative on December 15, 1966 but it was stayed pending appeal.

DETERMINATION OF ISSUES PRESENTED:

Count I: Grounds for the suspension or revocation of respondent's license under Section 24200(a) of the Alcoholic Beverage Control Act and within the meaning of Article XX, Section 22 of the California Constitution were established.

PENALTY: The license is suspended for 30 days.

Dated at Los Angeles, California, March 14, 1967.

/s/ George K. Bellows
George K. Bellows, Hearing Officer
Office of Administrative Procedure

APPENDIX B.

Certificate of Decision.

State of California, Department of Alcoholic Beverage Control.

File 38416

Reg. 2586

It is hereby certified that a Hearing Officer of the Office of Administrative Procedure having submitted the attached proposed decision, and the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommended penalty, adopted said proposed decision as its decision in the case therein described on April 20, 1967.

A representative of the Department will call on you on or after June 8, 1967 to pick up the license certificate.

Sacramento, California

Dated: April 20, 1967

/s/ Dorothy Pierson
Hearing and Legal Unit

ABC-132A (1-67)

RIGHT OF APPEAL

The attached document is the decision of the Department of Alcoholic Beverage Control in the matter described. As a party to the action, you have a right to appeal under the law. Appeals must be filed with the Alcoholic Beverage Control Appeals Board, P.O. Box

1139, Sacramento, California 95805. The Appeals Board is an agency independent of the Department.

Requirements for filing appeals are set forth in Sections 23080-23087, Business and Professions Code (also known as Alcoholic Beverage Control Act), and Chapter 1.1, Title 4, Business Regulations, California Administrative Code. These requirements must be met.

Further information may be had by writing to the Alcoholic Beverage Control Appeals Board at the above address.

APPENDIX C.

Opinion of the Alcoholic Beverage Control Appeals Board.

Served on all parties by certified mail. Date Nov. 2, 1967.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

In the Matter of the Accusation against Probro, Inc. Lakewood Club, 17436-38 South Lakewood Blvd., Bellflower, Respondent and Licensee, under the Alcoholic Beverage Control Act. AB-2840.

File No. 38416; Reg. No. 2586.

Time & Place of Hearing; July 26, 1967, at 10 a.m. 1525 South Broadway, Los Angeles, California.

For Department: Honorable Thomas Lynch, Attorney General, John M. Huntington, Deputy Attorney General.

For Appellant: Bernard Minkow, Esq.

In a decision adopted by the department on April 20, 1967, it was determined that grounds for suspension or revocation of appellant's license under the provisions of section 24200(a) of the Alcoholic Beverage Control Act and article XX, section 22 of the Constitution existed based upon findings that appellant utilized the services of female employees to serve alcoholic beverages to patrons while clad in costumes leaving their breasts exposed. The department imposed a penalty of suspension of the license privilege for a period of 30 days.

Appellant stipulated to the truth of the allegations of the accusation at the hearing before the department.

Therefore, the question of the sufficiency of the evidence to support the findings is not presented. Rather, appellant raises the following specific questions to be considered:

"1. Whether or not the acts complained of are, in and of themselves, acts contrary to public welfare and morals;

"2. Whether or not Article XX, Section 22 of the California Constitution and Section 24200(a) of the California Business and Professions Code are unconstitutionally vague;

"3. Whether or not the acts of the Department are those of a censor;

"4. Whether or not the Department has abused its discretion in bringing these accusations against Respondent; and

"5. Whether or not the action of the Department is violative of the First Amendment to the United States Constitution."

The department's decision contains the following findings of fact:

"COUNT I

"The demurrer to the Accusation was overruled on each of the points raised and it was then stipulated that the facts alleged are true and I accordingly find it to be true that within one year last past and immediately preceding the date of this accusation, respondent licensee, directly and by and through its agents, employees, and servants, permitted and suffered the above-designated licensed premises to be used in a manner more particularly described below, which did create a condition then

and there contrary to public welfare and morals in violation of Article XX, Section 22 of the California State Constitution and Section 24200(a) of the Business and Professions Code:

"1. On or about May 27, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Reagan Wilson, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini shorts with her breasts fully exposed.

"2. On or about May 28, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Joan Rae Allen, and did permit and suffer the said female to tend bar and wait on patrons while attired in panty shorts with her breasts fully exposed.

"3. On or about June 21, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Judithann Hudson aka Reidman, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini pants with her breasts fully exposed.

"4. On or about July 29, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Sharon Lee Huff, and did permit and suffer the said female to tend bar and wait on patrons while attired in capri pants with her breasts fully exposed.

"5. On or about October 26, 1966, respondent licensee, at and in the above designated licensed premises, did employ and use the services of two females, Joanne Mary Turcotte and Margaret Theodosia Dosa, and did permit and suffer the said females to tend bar and wait on patrons while attired in bikini pants with their breasts fully exposed.

"6. For purposes of considering the imposition of penalty against the respondent, if any, it is further found that the above named respondent has permitted certain female employees to tend bar and wait on patrons while attired in brief bikini-type panties with their breasts fully exposed at the above described premises, commencing on or about March 21, 1966 and continuing thereafter up to the date of this accusation, including, but not limited to, the dates hereinabove mentioned in paragraphs 1, 2, 3, 4 and 5. Said conduct continued notwithstanding the filing of an accusation against said respondent on or about May 6, 1966 entitled 'In the Matter of the Accusation Against Probro, Inc. dba Lakewood Club,' File No. 38416, Reg. No. 9344, alleging a violation of Article XX, Section 22 of the California Constitution and Section 24200(a) of the Business and Professions Code for permitting said conduct to occur on said licensed premises on four specified dates, to wit, on March 21, 1966, March 22, 1966, March 25, 1966 and April 23, 1966.

* * * * *

"Despite the allegation in sub-count 6 of Count I for the purpose only of considering any penalty to

be imposed and the stipulation that the facts therein set forth are true, said facts are not being considered in the penalty recommended below because the decision on the prior accusation referred to is still not final."

We consider first appellant's contention that the department's decision is "violative of the Constitution of the United States" under the First Amendment protection of freedom of expression. We considered this argument in the matter of the appeal of Boreta Enterprises, Inc., AB-2519, and stated as follows:

"3. *The guarantees of freedom of speech and expression in the Federal and State Constitutions do not limit the authority of the Director to suspend or revoke the license to sell alcoholic beverages if the licensee persists in selling alcoholic beverages by employing waitresses who serve such alcoholic beverages with bared breasts.*

"We have carefully considered the authorities cited by appellant. We have no argument with the rules of law cited therein as to the importance of free speech and free expression. While this matter has been under consideration we have studied the recent U. S. Supreme Court decisions in *A Book, etc. v. Atty. Gen. of Commonwealth of Massachusetts,* 86 S. Ct. 975 (1966); *Ginzburg v. U. S.,* 86 S. Ct. 942 (1966); and *Mishkin v. State of New York,* 86 S. Ct. 958 (1966); If anything, these decisions reinforce our conviction that the issue of free expression is not pertinent on the facts presented to us.

"The facts are uncontradicted. The licensee's employees were waitresses who took orders and served

alcoholic beverages to customers and, in the course of such employment, 'did display and expose their breasts to patrons and persons assembled' at the premises. Photographs of one of the waitress-employees were distributed to patrons of licensee according to ticket number. Clearly, the commercial aspect of the enterprise was the paramount consideration here. The women were employed as and acted as waitresses. It is the regulation of the attire and conduct of the waitresses to which the attention of the department was directed. The issue before us at this point is whether the department was constitutionally engaged in the regulation of commercial activity.

"We are mindful of the fact that free speech is protectible even where it is published in a paid advertisement. (*New York Times v. Sullivan,* 376 U.S. 254, at 266 (1964).) But there the content of the expression was not related to a commercial activity. Where, on the other hand, commercial activity is involved, the Constitution affords no like protection of freedom of expression respecting commercial advertising. (*Valentine v. Chrestensen,* 316 U.S. 52, 54 (1941); *Murdock v. Pennsylvania,* 319 U.S. 105, 108 (1942). *Mishkin* and *Ginsburg,* supra, deal in some detail with the significance of commercial activity in determining the scope of obscenity. The facts here are, of course, substantially different. But the commercial nature of the waitresses' actions and attire is a fact important to this constitutional issue which appellant's argument does not overcome and which renders its authority inapplicable here.

"We have also considered *Weaver v. Jordan,* 64 A.C. 243, 49 Cal. Rptr. 537 (1966), to determine if this re-

cent pronouncement of our California Supreme Court casts any light on this problem. But that case turns on the absolute prohibition of a form of communication. Like *New York Times v. Sullivan, supra,* the commercial aspects of the communication were incidental to the absolute prohibition of the form of communication. The court in *Weaver* noted with approval the distinction pertinent here, that:

> " 'The dissemination of protected expression under commercial auspices is of course to be distinguished from the dissemination of "purely commercial" communications such as mercantile advertising—which do not enjoy the First Amendment protection otherwise accorded. (See *Murdock v. Pennsylvania, supra* (1943) 319 U.S. 105, 110-111; *Valentine v. Chrestensen* (1942) 316 U.S. 52, 55 (62 S.Ct. 920, 86 L.Ed. 1262); *New York Times Co. v. Sullivan, supra,* (1964), 376 U.S. 254, 266.)'
> (*Weaver v. Jordan, supra,* at page 255 (fn. 11).)

"Thus we return to the authority vested in the department to regulate the highly sensitive alcoholic beverage industry. Constitutionally this is delegated to the states by the Twenty-First Amendment to the United States Constitution and by the California Constitution to the Legislature and the department. Regulation is a proper exercise of the police power of the state. Where, as here, the regulation is accomplished by procedure affording due process of law, there is no error. The recent U.S. Supreme Court cases of *Seagram v. Hostetter, supra,* 86 S.Ct. ..... (1966), 34 U.S. Law Week 4355, supports this position."

Appellant's next contention is that the provisions of article XX, section 22 of the Constitution and section 24200(a), Alcoholic Beverage Control Act, are so indefinite and uncertain that the bringing of an action by the department under said provisions constitutes an abuse of discretion. In the recent case of Caskey, AB-2620, we considered this question as follows:

". . . Appellant makes the argument that the constitutional provision granting the department the right to suspend or revoke a license upon the determination that 'continuance of such license would be contrary to public welfare or morals' is unconstitutionally vague and uncertain. Our attention has been directed to no case in which the validity of article XX, section 22 on this point has been presented. The authority of the department to proceed directly under this constitutional provision without alleging the violation of any specific statute or rule has been recognized. Thus in *Mack v. Dept. of Alcoholic Bev. Control,* 178 Cal. App.2d 149, 2 Cal. Rptr. 629, relating to bookmaking activities on the licensed premises by the bartender, the department proceeded directly under the provisions of section 24200(a) (public welfare and morals). The same was true in the cases of *Quilici v. Dept. of Alcoholic Bev. Control,* 178 Cal. App.2d 549, 3 Cal. Rptr. 49; *Munro v. Alcoholic Bev. Control Appeals Bd. & Weiss,* 181 Cal. App.2d 162, 5 Cal. Rptr. 527; and *Harris v. Alcoholic Bev. Control Appeals Bd. & Roundhouse,* 197 Cal. App.2d 172, 17 Cal. Rptr. 315. While in each of these cases there was a penal statute prohibiting the conduct involved, this distinction may not be as substantial as it first appears for the misconduct did not relate to the sale of alcoholic beverages and there is

nothing in the Constitution, the Alcoholic Beverage Control Act, or the department rules that informs a licensee that he may be held responsible for the unlawful conduct of his employee in the absence of an allegation and a finding, supported by the evidence, that the licensee permitted said unlawful conduct.

"The case of *Vallerga v. Depart of Alcoholic Bev. Control,* 53 Cal.2d 313, 1 Cal. Rptr. 494, deals with this question to some extent. There the department had proceeded against the licensee under the provisions of section 24200(e) of the Alcoholic Beverage Control Act forbidding a licensee to permit his premises to become a ' "resort" for . . . prostitutes, pimps, panderers or sexual perverts.' The Supreme Court held this statute to be unconstitutional as violative of the 'good cause' requirement of article XX, section 22. In the course of its opinion, the court stated:

> " 'The foregoing is sufficient evidence of a display of sexual desires and urges which, when made in a public place as a continuing course of conduct, could reasonably be found by the trier of fact to be "contrary to public welfare and morals." It is apparent in the present case, however, that the foregoing evidence was not relied upon by the finder of fact in arriving at the conclusion that continuance of the license would be contrary to public welfare or morals. . . .'
>
> * * *
>
> " 'Section 22, article XX of our Constitution vests the Department of Alcholic Beverage Control with authority to institute disciplinary proceedings against a licensee and to revoke his license upon determination "for good cause" that the con-

tinuance of such license would be "contrary to public welfare or morals." Nothing we have herein stated is to be construed as infringing upon such authority. . . .'

"In the recent United States Supreme Court case of *Seagram v. Hostetter,* 86 S.Ct. 1254, an attack was made upon the 'minimum price' provisions of the New York liquor control law upon the ground, among others, that the statutory definition of 'related person' was unconstitutionally vague. In dealing with this question, the court, in quoting from an earlier case, stated in part:

> "'". . . we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality." . . .'
>
> (See also *Securities Comm. v. Chenery Corp.,* 332 U.S. 194.)

"The primary goal of the department in bringing disciplinary action against its licensees is to keep the regulated industry clean and wholesome. Where this is done by the application of a standard which is easily ascertainable and clearly understood by the industry, it is our opinion that the department has acted within its constitutional authority."

Based upon the foregoing, we find no merit in appellant's appeal. Conditions under which alcoholic beverages may be dispensed are subject to state control. In this type of a disciplinary proceeding the department

acts only after affording the licensee an opportunity for a full hearing. Such procedure affords due process of law.

In our opinion, the findings are supported by substantial evidence and the findings support the department's decision. The decision of the department is affirmed.

Donald R. Wagner, Chairman
Alcoholic Beverage Control
Appeals Board

We Concurr: Robert I. Tuttle, Adrienne Sausset, Sacramento, California, October 24, 1967.

APPENDIX D.

Decision of the Court of Appeal.

Los Angeles, Cal. Jan. 2, 1968

Title, Probro, Inc, etc. Superior Court of LA No. 32520.

THE COURT:

Petition for Writ of Mandate Denied.

Clay Robbins, Clerk

APPENDIX E.

Decision of the California Supreme Court.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102, Jan. 31, 1968.

Dear Sir: I have this day filed Order

Hearing Denied

In re: 2 Civ. No. 32520, Probro, dba Lakewood Club vs. Dept. of A.B.C.

Respectfully,

William I. Sullivan
Clerk

APPENDIX F.

Decision of the Court of Appeal.

Los Angeles, Cal. Feb. 26, 1968

Title, Probro, Inc. vs. Dept of ABC, etc. No. 32520.

THE COURT:

Petition for order staying administrative decision denied.

Clay Robbins, Clerk

APPENDIX G.

Order.

Supreme Court of the United States, No. ....., October Term, 1967.

Probro, Inc., d/b/a Lakewood Club, Petitioner, vs. The Department of Alcoholic Beverage Control of the State of California.

Upon Consideration of the application of counsel for the petitioner and of the opposition of the State of California thereto,

It Is Ordered that the administrative order of the Department of Alcoholic Beverage Control of the State of California, suspending the permit of the petitioner for a period of thirty (30) days after February 29, 1968, be, and the same is hereby, stayed pending the timely filing of a petition for a writ of certiorari in the above-captioned cause. Should such a petition be so timely filed, this stay is to continue pending this Court's action on the petition. In the event the petition for a writ of certiorari is denied, this stay is to terminate automatically. Should the petition for a writ of certiorari be granted, this stay is to remain in effect pending the issuance of the mandate of this Court.

/s/ W. O. Douglas
Associate Justice of the Supreme
Court of the United States.

Dated this 5th day of March, 1968.

APPENDIX H.

Findings of Fact and Conclusions of Law.

Superior Court of the State of California, for the County of Los Angeles.

Probro, Inc., d/b/a Lakewood Club, Petitioner, vs. The Department of Alcoholic Beverage Control of the State of California, Respondent. No. 920 751.

Filed Mar. 11, 1968.

This Matter Came Regularly before this Court on February 5, 1968 for hearing. Samuel Goldfarb appeared as attorney for Petitioner and Kenneth Scholtz, Deputy Attorney General of the State of California, appeared as attorney for Respondent. The record of administrative proceedings having been received into evidence and examined by the Court, no additional evidence having been received by the Court, arguments having been presented, and the matter having been submitted for decision, the Court makes the following:

FINDING OF FACTS

1. That portion of Respondent's finding which finds that the employment of "topless" waitresses is contrary to public welfare and morals is not supported by substantial evidence in light of the whole record.

From these facts the Court makes the following:

CONCLUSIONS OF LAW

1. Respondent committed a prejudicial abuse of discretion, within the meaning of California Code of Civil

Procedure, Section 1094.5(b), in that Respondent's findings are not supported by the evidence as found in this Cort's Findings of Fact No. 1.

2. This matter is remanded to Respondent for additional hearing and the taking of evidence on whether the employment of "topless" waitresses is contrary to public welfare and morals. See In re Davis, 242 CA 2d 645, 667 (1966).

Let Judgment Be Entered Accordingly.

Dated Mar. 11, 1968.

/s/ Robert S. Thompson
Judge

APPENDIX I.

Judgment.

Filed Mar. 11, 1968.

Superior Court of the State of California, for the County of Los Angeles.

Probro, Inc., d/b/a Lakewood Club, Petitioner, vs. The Department of Alcoholic Beverage Control of the State of California, Respondent. No. 920 751.

This Matter Came Regularly before this Court on February 5, 1968 for hearing. Samuel Goldfarb appeared as attorney for Petitioner, and Kenneth Scholtz, Deputy Attorney General of the State of California, appeared as attorney for Respondent. The record of the administrative proceedings having been received into evidence and examined by the Court, no additional evidence having been received by the Court, arguments having been presented and the Court having made Findings of Facts and Conclusions of Law which have been signed and filed.

It Is Ordered That:

1. This matter be remanded to Respondent for additional hearing on the issue of whether or not the employment of topless waitresses is contrary to public welfare and morals.

Dated: Mar. 11, 1968

(Seal)

Robert S. Thompson

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 1373 Misc.

PROBRO, INC., dba LAKEWOOD CLUB,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1967
No. ..... Misc.

PROBRO, INC., dba LAKEWOOD CLUB,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

There were no written judicial opinions below. The Court of Appeal for the State of California denied without opinion the Petition for Writ of Mandate. (Appendix D of Petition.) Similarly, the Supreme Court of the State of California denied without opinion the Petition for Hearing filed herein. (Appendix E of Petition.)

Jurisdiction

Respondent adopts the jurisdictional statement set forth in the Petition.

Statement of Questions Presented

1. Was it a violation of the Due Process Clause of the Fourteenth Amendment for the Department of Al-

coholic Beverage Control to suspend Petitioner's license to sell alcoholic beverages upon the ground that petitioner had engaged in conduct which was "contrary to public welfare or morals," as that phrase is used in Article XX, Section 22, of the Constitution of the State of California and as that phrase has been applied by the courts of the State of California?

2. Does the Due Process Clause of the Fourteenth Amendment require that decisions of the Department of Alcoholic Beverage Control of the State of California be based upon a record which must include evidence specifically demonstrating the manner in which the conduct complained of is contrary to public welfare or morals?

3. Is it a denial of equal protection of the laws under the Fourteenth Amendment for the Department of Alcoholic Beverage Control of the State of California to enforce an order suspending Petitioner's license which has been affirmed by the Supreme Court of California when the lawfulness of action taken by the Department in other similar cases is still the subject of litigation pending in the lower courts in California?

4. Is the following conduct protected by the provisions of the First Amendment respecting free speech: Petitioner operated a beer bar in which the women who tended bar and waited on patrons wore costumes which fully exposed their breasts to public view (colloquially known as "topless waitresses"). If such conduct is in the nature of speech protected by the First Amendment does the Department of Alcoholic Beverage Control of the State of California have authority to determine that such conduct should not occur in a place where alcoholic beverages are sold and consumed?

Statement of the Case

The only case which is the subject of the Petition is the case which was the subject of the decision reproduced in Appendix A of the Petition.

The case commenced on November 30, 1966, with an administrative Accusation filed pursuant to section 11503 of the Government Code of the State of California. The Accusation alleged that on specified dates Petitioner had employed named females to tend bar and wait on patrons while attired in described costumes which exposed their breasts to public view. The Accusation further alleged that the described conduct was contrary to public welfare or morals within the meaning of Article XX, Section 22, of the Constitution of the State of California and section 24200(a) of the Business and Professions Code of the State of California and was cause for the suspension or revocation of Petitioner's license to operate a premises in which beer could be sold and consumed.

On February 21, 1967, the Accusation duly came on for hearing before a hearing officer of the California Office of Administrative Procedure, pursuant to sections 11502 and 11512 of the Government Code of the State of California. Petitioner was represented at the hearing by his attorney, who stipulated that the facts alleged in the Accusation were true. No further evidence was submitted by either party.

On March 14, 1967, the hearing officer submitted a proposed decision to the Department pursuant to section 11517(b) of the Government Code of the State of California. (Petition; Appendix A.) The proposed decision, which recommended that Petitioner's license

be suspended for thirty days, was adopted by the Department without modification on April 20, 1967. (Petition, Appendix B.)

Petitioner appealed the decision of the Alcoholic Beverage Control Appeals Board which, on November 2, 1967, entered its opinion affirming the decision. (Petition, Appendix C.)

Petitioner then filed a petition for writ of mandate (which should have been denominated a petition for writ of review) in the Court of Appeal for the State of California pursuant to section 23090 of the Business and Professions Code of the State of California. The Court denied the petition on January 2, 1968. (Petition, Appendix D.)

Petitioner then filed a petition for hearing in the California Supreme Court, which was denied on January 31, 1968. (Petition, Appendix E.)

The case whose history has been set forth above is the only case which is the subject of the Petition for Writ of Certiorari. The Petition also relates the history of a prior Accusation which had been filed on May 6, 1966, and which was the subject of the Judgment entered by the Superior Court for the County of Los Angeles reproduced as Appendix I of the Petition and the Findings of Fact and Conclusions of Law reproduced as Appendix H. That case is still pending, inasmuch as the Department filed a Notice of Appeal to the Court of Appeal of the State of California on March 25, 1968.

ARGUMENT

I

The Claim That the Proceedings Against Petitioner Violated Due Process of Law Does Not Raise Any Substantial Federal Questions

A. This Case Does Not Involve Free Speech

This case involves the lawfulness of an order by the Department of Alcoholic Beverage Control of the State of California suspending Petitioner's license to sell beer at retail for consumption on the premises. It should be noted at the outset that Petitioner raises no question concerning the procedure followed below. It is unquestioned that Petitioner received adequate notice of the charges against it and was accorded a full opportunity to defend itself at the administrative hearing. Rather, Petitioner's argument is concerned with the validity of the constitutional authority upon which the Department's decision was based.

Petitioner is apparently of the opinion that this is a case involving free speech, since all the cases cited in its Petition but one (*Giacco v. Pennsylvania,* 382 U.S. 99) are cases decided under the First Amendment. But there is nothing in this record to indicate that the exercise of speech is anywhere involved. This case does not involve any books, plays, photographs, moving pictures, magazines or stage shows. The women who served beer and waited on patrons in Petitioner's licensed premises were not performers or entertainers. The only manner in which they differed from ordinary waitresses is that they wore costumes which left their breasts completely uncovered.

There is nothing in the record to indicate that the waitresses employed by petitioner were engaged in sym-

bolizing or communicating any ideas. *E.g. Board of Education v. Barnette,* 319 U.S. 624 (saluting the flag as a patriotic gesture); *Stromberg v. California,* 283 U.S. 359 (carrying a flag as a symbol of anarchy); *Thornhill v. Alabama,* 310 U.S. 88 (informational picketing).

Since free speech is not involved, the question of obscenity is irrelevant. For the definition of obscenity has been tailored to distinguish speech which is protected by the First Amendment from speech which is not protected by the First Amendment. *Roth v. United States,* 354 U.S. 476, 481-85. Thus, it is literally meaningless to assert that mere conduct, which possesses none of the attributes of speech, is not obscene, just as it would be literally meaningless to assert that Petitioner (a corporation) is not six feet tall.

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other forms of sexual misconduct." *Roth v. United States,* 354 U.S. 476, 512. (Dissent of Mr. Justice Douglas.)

B. Article XX, Section 22, of the California Constitution Is Sufficiently Specific to Delegate Administrative Authority

Since this case does not involve the exercise of First Amendment rights, those cases in which statutes impinging upon free speech have been declared unconstitutionally vague are equally inapplicable. The provisions of Article XX, Section 22, herein applicable do

not create any crimes. Thus, to the extent that any due process question might be raised by the text of Article XX, Section 22, of the California Constitution, the question would be whether the delegation of authority to an administrative agency is so broad or uncertain as to violate due process. *American Power Co. v. Securities & Exchange Commission,* 329 U.S. 90, 105. And it is established by cases such as *American Power* that a lesser degree of specificity is required in statutes delegating administrative authority than in statutes defining criminal offenses.

This case does not raise any substantial federal question concerning the delegation of authority to the California Department of Alcoholic Beverage Control. Petitioner approaches the question as though the offending phrase were perched barren and unattended in the State Constitution. In fact, its definition has been established by the manner in which it has been applied in numerous cases decided in the courts of California, which this Court must take into consideration. *Musser v. Utah,* 333 U.S. 95, 97; *Cox v. New Hampshire,* 312 U.S. 569, 575; *Bandini Co. v. Superior Court,* 284 U.S. 8, 18.

The phrase "contrary to public welfare or morals" has never been expressly defined in California. However, the California Department of Alcoholic Beverage Control and its predecessor, the State Board of Equalization, has been authorized to deny, revoke or suspend licenses on those grounds since the repeal of prohibition. In the ensuing thirty-five years there have been numerous cases in which the courts have had to decide whether the Department had abused its discretion in determining if conduct or conditions were contrary to

public welfare or morals, but in none of these cases have the courts questioned the specificity of the delegation of authority. See *Jordan v. De George,* 341 U.S. 223, 230.

A large number of prior cases have supported the authority of the Department to suspend or revoke in cases in which the licensee has permitted excessive sexual conduct or has unduly exploited sex to promote the sale and consumption of alcoholic beverages. Among those cases are *Jacques, Inc. v. State Board of Equalization,* 155 Cal. App. 2d 448, in which the licensee put on lewd shows with live "entertainers" and exhibited films, both of which portrayed acts of sexual intercourse and nude women performing "lewd, obscene and immoral dances:" *Presto v. Alcoholic Beverage Control Appeals Board,* 179 Cal. App. 2d 262, in which the licensee permitted prostitutes to solicit customers in the licensed premises; *Kershaw v. Department of Alcoholic Beverage Control,* 155 Cal. App. 2d 544, in which patrons engaged in acts of sexual gratification in public view; *Cornell v. Reilly,* 127 Cal. App. 2d 178, in which female employees solicited male customers to purchase drinks for them; and *Mercurio v. Department of Alcoholic Beverage Control,* 144 Cal. App. 2d 626, in which the court upheld an administrative rule that it was contrary to public welfare or morals for female employees of a licensee to either solicit or accept drinks from patrons. The case most directly in point is *Adler v. Department of Alcoholic Beverage Control,* 174 Cal.

App. 2d 256, in which two clothed taxi dancers briefly displayed their breasts to customers, which is to be contrasted with the females employed by Petitioner, whose breasts were uncovered throughout the entire time that they were serving and waiting upon patrons. In view of these cases there is no merit to Petitioner's contention that the law gave no notice and provided no standard upon which the Department could act.

It should be observed that the Department does not have *carte blanche* to act at whim in exercising its discretion to determine if conduct is contrary to public welfare or morals. The California Constitution requires that the Department's action be based upon "good cause." This means that "its decisions should be based upon substantial evidence and it should not act arbitrarily in determining what is contrary to public welfare or morals." *Martin v. Alcoholic Beverage Control Appeals Board,* 55 Cal. 2d 867, 876. Among the cases in which decisions of the Department have been reversed because the conduct was held, as a matter of law, not to be contrary to public welfare or morals are *Stoumen v. Reilly,* 37 Cal. 2d 713, 717, in which the evidence only established that homosexuals patronized a restaurant but did not establish that any illegal or immoral acts occurred there, and *Vallerga v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 313, in which the court held unconstitutional a statute authorizing the Department to revoke a license if it found that the premises were a resort for illegal possessors of nar-

cotics, prostitutes, pimps, panderers, or sexual perverts solely upon evidence of general reputation and without requiring evidence of specific acts on the premises.

II

The Enforcement of the Department's Decision Will Not Deny Petitioner Equal Protection of the Laws

The theory behind Petitioner's contention is somewhat obscure. It was not expressly raised in the State courts and is not explained in the Petition.

The instant Petition seeks review of decisions of the California Supreme Court and Court of Appeal denying Petitioner's petition for a writ of review. Under California law, such denials amount to a decision on the merits affirming the decision of the Department as to all issues, even though the decision is made without opinion. *People v. Western Airlines,* 42 Cal. 2d 621, 630. Respondent knows of no principle which would prevent the Department from enforcing a decision which has been affirmed by the highest court of the State merely because lower courts have made conflicting decisions in other cases which are still pending on appeal.

III

The Decision of the Department Does Not Constitute the Exercise of Unauthorized Powers of Censorship

The third reason advanced by Petitioner for granting the writ is extraordinarily baffling. We cannot tell what point the Petition is trying to make.

If the claim being advanced is that the Department exceeded the scope of authority delegated to it by the

State, the question would not seem to involve any Federal Constitutional Rights. Petitioner's argument that the decision has nothing to do with the regulation of the sale of alcoholic beverages is incomprehensible in view of the fact (stipulated to by petitioner) that the conduct in question occurred in connection with the sale and consumption of beer at Petitioner's licensed premises.

Petitioner may be trying to raise a question involving free speech, in view of its assertion that the decision amounts to a prior restraint. We have already demonstrated that the instant case does not involve the exercise of any rights protected by the First Amendment. Even if it did, the State would have authority to regulate the exercise of such rights in connection with its regulation of the sale and consumption of alcoholic beverages. *Cf. Koningsberg v. State Bar of California,* 366 U.S. 36, 50; *United States v. Harriss,* 347 U.S. 612, 625; *Prince v. Massachusetts,* 321 U.S. 158.

Conclusion

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,

KENNETH SCHOLTZ,
Deputy Attorney General,

Attorneys for Respondent.